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Donna R. Searcy  
Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

FCC MAIL BRANCH

Dear Ms. Searcy:

Please find enclosed comments regarding the Notice of Proposed Rule Making released March 2, 1993 regarding direct broadcast satellite (DBS), MM Docket No. 93-25. Pat Juarez and I wrote these comments in the context of a Communications Law class offered at William Mitchell College of Law in St. Paul, Minnesota. Our perspective stems from our study of communications law as well our own anticipated experience as future consumers of the DBS. We each have confined ourselves to discussion of a section of the Carriage Obligations for Noncommercial, Educational, and Information Programming.

I hope that you find our comments useful.

Sincerely,



Ann Dunn

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In this comment, I will argue that the Congress's mandate that DBS providers set aside 4-7% of their capacity for noncommercial, educational and informational programming does not promote the pro-competitive goals toward which the 1992 Cable Act claims to strive. Therefore, the FCC's regulations should allow the greatest possible degree of flexibility toward DBS providers. I hope to show that the FCC needs to be forward-looking in its regulation, recognizing other future competition for cable and DBS. I wish to show that Congress's mandate flies in the face of the goals it claims to pursue. However, recognizing that the FCC must devise regulations based on this Act, I will make suggestions for dealing with these anti-competitive requirements in the most pro-competitive light possible.

#### ACKNOWLEDGING FUTURE COMPETITION

Although Congress has appeared to ignore the inevitable burgeoning communications technology, it is critical that the FCC acknowledge the probable entry of other competitors into the information/entertainment industry. Regulations need to be made with an appreciation of who DBS's competitors will be in information and entertainment services. The FCC's July 16, 1992 "video dialtone" ruling will allow local phone companies to carry video programming owned by others on a common carrier basis.<sup>2</sup> To the extent that Bell Operating Companies (BOCs) become involved in providing entertainment,<sup>3</sup> all entertainment/ information providers should have the same restrictions. It has even been suggested that the ideal fiber optic grid for a system such as video dialtone should resemble

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<sup>2</sup>Karen A. Douglass, *The Video Dialtone Opportunity*, Rural Telecommunications, Apr./May 1993, at 31.

<sup>3</sup>(See Johnnie L. Robert, Laura Landro & Mary Lu Carnevale, *Time Warner and US West Plan Alliance*, Wall St. J., May 17, 1993 at A3, A5.

that of the phone system, not the average cable T.V. System.<sup>4</sup>

In any event, where the Commision deems regulation to be in the "public interest, convenience, and necessity,"<sup>5</sup> it should strive to put all entertainment service providers on the same competitive footing. In my mind, that leaves two broad alternatives. The first option is to regulate all information/entertainment service providers, including cable, broadcast, and DBS as common carrier-like entities (using the telephone companies as a model).<sup>6</sup> In this scheme, the communications industry would contain information/entertainment providers, who provide programming and are liable for its content, and separate service providers, who provide their facilities indiscriminately to the information providers to convey that programming without editorial control over its content. The other, more practical option is to let DBS be responsible for its own programming, including making its own decisions as to specific capacity allotments for noncommercial, educational and informational programming.

#### THE CABLE ACT UNDERMINES ITS OWN COMPETITIVE GOALS

Of course, Congress has mandated that DBS providers will provide noncommercial, educational, informational programming on 4-7% of their capacity without exercising any editorial control over its content. My opinion is that these requirements run counter to Congress' supposed goals of the 1992 Cable Act: to allow free market competition to

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<sup>4</sup>Robert Wright, *The New Democrat From Cyberspace*, *The New Republic*, May 24, 1993, at 21, 24.

<sup>5</sup>Communications Act of 1934, 47 U.S.C.A. §307.

<sup>6</sup>Naturally, there would be several complications, because under Title VI of the Communications Act, FCC cannot regulate cable as a common carrier.

"regulate" the cable industry with some help from its mandates. Congress purports to acknowledge the need for competition for cable. In the Act's findings, Congress stated that "without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers." Cable Television Consumer Protection and Competition Act of 1992, ("1992 Cable Act") Pub. L. 102-385, Oct. 5, 1992, §2 Findings. Indeed, §19 prohibits cable program providers from discriminating against multichannel video programming distributors regarding rates, terms, and conditions of sale and delivery. However, since cable can originate its own programming, this does not put DBS and cable on equal competitive ground, especially when it comes to noncommercial, educational, and informational programming. DBS is confined to depending on cable, and others, to receive programming.

### RECOMMENDATIONS

Recognizing that transforming all information/entertainment providers into either a common carrier or a programmer is neither practical at this time nor within the scope of requested comments, I wish to concentrate on how to affect the Congress's pro-competitive goals. I believe that in order to provide the competition that cable needs, DBS must be able to provide its own programming, including noncommercial, educational, and informational programming. Most of the applicants that the FCC has accepted to provide DBS services to consumers have considerable experience in and facilities and personnel to create their own programming of this nature. It is inappropriate that these DBS operators should merely become a conduit for programming over which they can exercise no control. It is

inappropriate because, as the FCC has already stated, the best way to promote the expansion of new technologies is not to regulate it, but let market forces determine its fate. The requirement sabotages this theory by debilitating its competitive sword -- its programming. In addition, it undermines the creative spirit and integrity of the DBS broadcasters by removing the incentive to program new and innovative material of their own making. It also shows little faith in their own self-imposed requirements to offer quality programming, including educational and informational programming. For these reasons on which I will elaborate further, I propose that DBS operators be allowed to include their own programming into the 4-7% requirement. Although the DBS provider will not be able to exercise editorial control over the programming of other noncommercial, educational, and informational program providers,<sup>7</sup> they can have full control over the DBS-originated programming which they send over their service.

#### BEST METHOD FOR PROMOTING NEW TECHNOLOGY

The FCC has long believed "that competition between many operators is the best way to hasten the development of improved technologies", *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976)(although the Commission would later determine SMRS to be a common carrier<sup>8</sup>, it acknowledged the effect such a determination would have on a new technology's progress). Indeed, the FCC has maintained a proclivity toward free

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<sup>7</sup>It appears unavoidable, without striking down the Act, to escape Congress' prohibition on DBS providers from making editorial decisions on the programming of others.

<sup>8</sup>*NARUC v. FCC (NARUC II)*, 533 F.2d 601 (D.C. Cir. 1976).

competition.<sup>9</sup> In fact, when the Commission was first considering DBS's entry into the communications market, it understood how regulation would inhibit the growth of DBS systems. In the Notice of Inquiry, the Commission "concluded that access requirements should not be imposed on experimental DBS systems. [The FCC] pointed out that, by requiring operators to relinquish control over programming services, [the FCC] might significantly impede an operator's ability to market his service and thereby achieve an acceptable return on his investment."<sup>10</sup> In the Interim Rules, the Commission "continue to believe that the public interest would not be served by subjecting entrepreneurs, particularly during this experimental phase, to regulatory burdens that could substantially reduce their incentives to initiate this promising new service."<sup>11</sup> As the Commission has recognized the advantages of allowing new technologies to enter the marketplace unhindered by regulation, I advocate that DBS operators be allowed to enter the industry with the least regulatory restrictions possible.

#### THE RULE DISABLES DBS's ABILITY TO COMPETE

Although the FCC has said that it wants to keep regulation flexible, in effect, the proposed rules will actually be more restrictive than other media, such as cable. The Commission proposes to regulate DBS like a broadcaster for all but the reserved allotment, including political broadcasting and indecency requirements. However, In 1988, the court of appeals

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<sup>9</sup>See Report and Order, Deregulation of Radio, 46 Fed.Reg. 13888 (1981).

<sup>10</sup>Report and Order in Gen. Docket No. 80-603 ("DBS Reporter and Order"), 90 FCC 2d 676, 714.

<sup>11</sup>*Id.*

affirmed the FCC decision that DBS services were not "broadcasting" services and thus not subject to the Communications Act of 1934.<sup>12</sup> Chief Judge Wald dissented, arguing that the legislative history clearly indicated that broadcasting could include DBS. Quoting former FCC Commissioner Rivera, she queried: "It looks like broadcasting, smells like broadcasting, tastes like broadcasting, has all the benefits of broadcasting, but it's not regulated like broadcasting because it didn't exist when the Communications Act was adopted?" *NABB*, 849 F.2d at 671 (C.J. Wald dissenting)(cite omitted, quoting Remarks of Henry M. Rivera, Commissioner, Federal Communications Commission, before the American Law Institute - American Bar Association (Mar. 29, 1984)). Similarly, although commentators have argued that the classification is unjustified, cable television is regulated as a broadcaster, because cable is a broadcast-like source.<sup>13</sup> Yet where DBS will provide noncommercial programming, it is to merely act as a common carrier-like facility, or at least to have no editorial control,<sup>14</sup> even though it will look like cable.

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<sup>12</sup>*National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988)(hereinafter "*NABB*").

<sup>13</sup>*Id.* at 623.

<sup>14</sup>I understand that the FCC sees this as more analogous to political broadcasting rules where broadcasters are required to present political candidates, but are not allowed to editorialize and must present them in full. In such situations, a broadcast station will not be held liable for anything said by a candidate. *Farmers Educational and Cooperative Union v. WDAY*, 360 U.S. 525 1959. However, I see this as essentially regulating DBS as a common carrier for these limited services.

Whether DBS in this capacity can be classified as a common carrier depends on who is defined as its potential users. If programmers are considered the users, then DBS will not exactly be a common carrier, because it does not hold itself out to all programmers indiscriminately. It would only hold itself out to the National Educational Programming Supplier(s), as the Commission decides to define it (or them). However, I would argue that the potential users are the public to whom the DBS operator will offer its services indiscriminately. Although not everyone will have the capability to receive the signals at



Although I understand that DBS may bring programs to a region in which they have never been seen before. This will merely affect greater access to the same programming which is currently available. However, it will not stimulate the new and innovative programming, which DBS providers would generate, absent the rules, in order to compete with each other and with current educational/ entertainment providers. Prohibiting editorial control will preclude DBS from creating new programs or from entering into contracts and joint ventures with various program providers to create new programs. DBS operators have the most to gain (and to lose) monetarily from providing this service. Logically, if liability does not fall to DBS provider, it would fall to the noncommercial entity. But I would argue that it will engender greater responsibility to place the burden on the DBS provider to monitor its service. After all, regardless of legal liability, it is the DBS provider that the public will hold accountable for anything that it receives through its DBS services.

To the consumers, it is the programming that is key. "Programming, and not technology, is the means by which consumers distinguish the various alternative services from each other."<sup>15</sup> Programming is the only relevant factor on which consumers will decide whether the cost for the service is worth what they pay. Therefore, programming is what will determine DBS's market success. "It has been suggested that there is no persuasive reason why the FCC should protect established broadcasters from the new technologies.

Commentators reason that the new technologies should have the opportunity to establish their

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first, I do not see this as substantially different from the need to have phone equipment to receive telephone service, which is clearly a common carrier.

<sup>15</sup>The Georgetown Space Law Group, *DBS Under FCC and International Regulation*, 37 Vand. L. Rev. 67, 98 (1984).

desirability in comparison to conventional media. This process will allow the public to 'vote' with its pocketbook for preferred broadcasting services."<sup>16</sup> If DBS emerges as a viable program source, it could present an alternative to the present television networks. As it stands in the wake of the 1992 Cable Act, a cable company could technically provide educational/informational programming to DBS. Yet DBS operators could not originate such programming, because it would give them editorial control. Instead of operating in a subordinate position to cable operators or other educational programming entities, a DBS provider should be able to have complete control over its programming, including the educational programming.

#### DBS OPERATORS SHOULD BE ALLOWED TO SELF-REGULATE

Regulating DBS providers before the service even gets off the ground shows little faith in DBS operator's capability to provide educational programming as part of their own self-determined missions. For example, United States Satellite Broadcasting Company (USSB), a subsidiary of Hubbard Broadcasting, Inc. already sees providing this kind of programming as their obligation independent of the regulations.<sup>17</sup> They expect this of themselves -- the only difference is that Congress has set specific requirements.<sup>18</sup>

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<sup>16</sup>Elletta Sangrey Callahan, *Cable Television vs. Direct Broadcast Satellites: Market Competition Replaces the FCC as the Guarantor of the Public Interest*, 34 Syracuse L. Rev. 851, 876-77 (1983)

<sup>17</sup>Telephone interview with James A. Barnum, Associate General Counsel, Hubbard Broadcasting, Inc.

<sup>18</sup>Telephone interview with Marvin Rosenberg, Fletcher, Heald & Hildretch, who represents Hubbard Broadcasting, Inc. in Rosslyn, VA.

These specific requirements, that 4-7% of the DBS capacity be set aside for noncommercial, educational, and informational programming, should be interpreted in the least restrictive means possible. On other occasions, the FCC has even refused to impose guidelines on the amount or nature of programming based on the marketplace theory.<sup>19</sup> This requirement is ambiguous as to whether this will amount to a percentage of total channel (resulting in certain channels being set aside) or whether it should be measured against programming capacity after compression, factoring in the differing amount of capacity various kinds of programming requires. Although regulations might escalate as DBS becomes a bigger player in the market, I feel that this requirement should provide some leniency at first. For example, the 4-7% could be measured against a time of the day that offers the least amount of programming, assuming all programming is being offered in its densest format (i.e. 1:00-5:00 a.m. time period, assuming all live programming, which would consume more capacity than would a movie). Again, I feel that the educational programming that the DBS operator should be allowed to produce could be included in this percentage allotment to fulfill this requirement.

### CONCLUSION

In summary, I recommend that the FCC stand by the policies it sought to promote when it first inquired into DBS. Generally, the Commission should continue to afford DBS as much regulatory freedom as possible in light of the 1992 Cable Act in order to allow this new technology to compete effectively within the anticipated vast information superhighway. Specifically, it should allow DBS the ability to produce its own programming with respect to its educational requirements, as it can for the other 93-96% of its programming capacity. At

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<sup>19</sup>*Action for Children's TV v. FCC*, 821 F.2d 741 (D.C.Cir. 1987).

least during DBS's infancy in the market, the 4-7% requirement should be interpreted as permissively as possible to allow DBS providers to exercise their own discretion. Finally, the DBS provider should be allowed to include its own educational programming into the 4-7% requirement in order to achieve the high degree of accountability that the public will expect.